ATTORNEY-CLIENT PRIVILEGE: CONSULTING WITH ACCOUNTANTS AND OTHER EXPERTS; AND THE USE OF KOVEL LETTERS

By Wayne D. Roberts and Katherine K. Wilbur

Throughout the course of either litigation or a business transaction, a legal issue may arise in which a taxpayer may need to provide personal and business information to his or her attorney. Taxpayers are able to obtain legal assistance and can feel confident in disclosing such information to their attorney, because such disclosures are confidential and subject to the attorney-client privilege.

When attorneys require the assistance of third-party experts to sort through a problem, the attorney or the taxpayer may be required to disclose confidential information to the expert. In the area of tax practice, privilege issues are prevalent – and relatively obvious – due to the often fine line between a civil tax case and a criminal tax defense matter, and the frequent need to consult third parties, like accountants, for assistance with respect to accounting or tax analysis. Virtually any tax analysis conducted affects the legal advice given, whether the advice relates to a contract, litigation, commercial, or other matter. Therefore, when a complex tax or accounting issue requires analysis and an expert is retained, the attorney should maximize the derivative protection available from the attorney-client privilege. In a non-tax practice, maximizing privilege with respect to both tax and non-tax analysis is also critical.

The seminal case in this area – United States v Kovel 1 – stands for the proposition that the attorney-client privilege will apply in cases in which the attorney discloses confidential information to a third-party expert. In the Kovel case, an accountant was employed by a law firm that specialized in tax law. The accountant was hired to listen to the facts of the case as communicated by the client, and then assist the attorneys in analyzing complex accounting and tax issues. Eventually, the accountant was ordered to testify in a grand jury investigation of one of the law firm’s clients for alleged tax violations. When the accountant refused to respond to questions in the grand jury investigation on grounds of attorney-client privilege, the judge noted that he was not a lawyer and charged him with contempt. The accountant defended his refusal to answer questions by asserting the attorney-client privilege because the questions related to conversations that took place with the law firm client and the attorney.

In a holding that forms part of the foundation for attorney-client communications with respect to experts – for both tax and non-tax practitioners – the United States Circuit Court of Appeals held:

The attorney-client privilege2 extends to an accountant such that an accountant can be present when the client relates a complicated tax story to an attorney because the accountant is facilitating the privileged communication as the attorney’s agent.

The court in Kovel specifically noted that accounting concepts are like a foreign language; the accountant is similar to an interpreter used to translate another language into English, which is done to allow the attorney to provide legal advice to a non-English speaker. To the extent the communications with the third party helped the attorney understand and convey information to the client, and were used to assist the lawyer in providing legal advice, the communications remained privileged. In addition, the court explained that the attorney-client privilege could be used to protect communications between a client, third party, and attorney where those communications were “necessary or at least highly useful” to discussions between the client and the attorney. The key practice point is that Kovel protections rely on the “facilitation of communications.”

By applying to the specific decision in Kovel, an attorney may avoid inadvertent privilege waivers in cases in which an expert is used to either interpret client communications or otherwise assist in the rendition of legal services. The following sections outline considerations for structuring an expert engagement to maximize attorney-client privilege protections.

THE HIRING PROCESS

First, an attorney should directly coordinate the retention of the expert in order to ensure that communications are covered by the attorney’s privilege with the client. If the attorney is the party who actually retains the expert, this indicates to courts that the attorney believed the third party was necessary and helpful for representing the client. Indeed, the retention by the attorney sheds light into the purpose for retaining the third party. This is important because the privilege will not apply to communications with a third party to the extent the third party is hired for a purpose other than assisting the
lawyer to provide legal advice. For example, if an accountant is hired directly by the client to provide accounting or tax preparation services for the client, or if the client hires the accountant in order to obtain the accountant’s advice, rather than the lawyer’s advice, then the attorney-client privilege will not apply. Consequently, the attorney should coordinate the hiring and confirm that the retention of the expert is to assist the attorney in providing legal advice to his or her client. To the extent possible, communications and contact with the third party should flow through counsel.

**The Kovel Letter**

Any engagement letter — *i.e.*, the *Kovel* letter — with the expert should also specifically state that the third party is being retained to assist the attorney in providing legal advice, and should prohibit any work that would involve the preparation of a tax form or other document that is intended to be filed with or disclosed to the government. When courts are required to analyze the necessity of retaining and disclosing confidential information to the third party, judges have looked to the nature of the advice given, the structure of the relationship, and the manner in which the advice was conveyed. Because such questions can arise years after the disclosures were made, often the best evidence of the relationship among the attorney, the client, and the third party is the engagement letter. Consequently, such letters are often closely scrutinized, and a well-advised attorney would take care to describe the legal purposes of the relationship with the third party both accurately and specifically in an engagement letter.

**Timing Issues**

The formality and order in which attorneys and experts are retained can be important to maintaining the attorney-client privilege. In general, if the attorney is retained before the accountant, then it is possible to maximize the available privilege. Alternatively, if the accountant is retained first, there may be no — or a limited — privilege. This issue generally arises in cases in which the client has a previous relationship with the third party before the attorney is hired. Because *Kovel* protects the attorney-client privilege only where the accountant has been hired to explain or interpret certain concepts to the attorney and to help the attorney better represent the client, it will be very important to distinguish that, notwithstanding the third party’s prior engagement, the current engagement relates only to assistance of the attorney in providing legal advice. If the client and attorney seek to use a third party, such as a client’s long-time accountant to assist with providing legal advice, the attorney should take great care to document that the third party’s advice is vital to the attorney’s representation of the client and the third party’s engagement for this purpose is separate from any prior engagements. Otherwise, in most cases, the attorney will need to be retained before the third party is hired to assist the attorney.

**Beyond Accounting**

Attorneys are often required to use the assistance of non-accountant third parties throughout their representation of clients. As outlined above, the holding in *Kovel* specifically addresses accountants, but the logic of *Kovel* also indicates that the attorney-client privilege may extend to a broad group of an attorney’s agents outside of the accounting and tax areas. For example, courts have noted that, at times, communications between an attorney and a doctor, secretary, investigator, accountant, foreign translator, foreign legal consultant, technical expert, investment banker, auditor, or patent agent who is hired to assist the attorney in providing legal advice may be privileged. It is easy to see how communications with a patent agent or physician may be necessary in a complicated patent or medical malpractice case, but the *Kovel* doctrine has also even been extended to less obvious experts such as public relations firms. Indeed, some courts have found that high profile cases require a public relations strategy as part of a party’s claim or defense, and are then willing to extend privilege protection to the attorney’s communications with a public relations consultant directed at supporting the client’s legal position or case. Other courts extend the privilege on the basis that the public relations consultant is the functional equivalent of the lawyer’s employee.

**Conclusion**

In both tax and non-tax practice, *Kovel* (*i.e.*, expert) engagements are important. But many engagements that are entered into to facilitate attorney-client communications do not provide for maximum protection because they are not structured based on solid *Kovel* principles. In some instances, the lack of a properly drafted *Kovel* letter may not become a primary issue in a case — e.g., because the case involves a transaction that closes without dispute, because the case does not raise criminal issues, or because the accountant or expert’s testimony can be disclosed without harm or embarrassment. In some cases, the attorney-client privilege can be critical. Therefore, attorneys and other third party experts are well-served to learn how to draft a proper *Kovel* letter, and to add a discussion of *Kovel* to their checklist of topics to cover in pre-engagement conferences with potential clients. And that discussion should note that any expert engagement must be structured so the agent is being used to facilitate a communication that is made both (1) in confidence and (2) for purposes of obtaining legal advice.
About the Authors

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Endnotes

1 296 F.2d 918 (2nd Cir 1961). The Kovel case serves as a guide for expert engagement letters that are routinely used by attorneys when an accounting or tax expert is retained to assist with complex accounting or tax issues; these engagement letters are often referred to as “Kovel letters.”

2 The attorney-client privilege is a “communication” privilege; therefore, the focus in a Kovel arrangement should be based on facilitating communications between the attorney and the client.

3 If legal advice relates to the preparation of a tax return or an item otherwise disclosed to the government, the communication generally will not be privileged.


9 Grand Canyon Skywalk Dev. LLC v. Cieslak, No. 2:13-CV-00596-JAD, 2015 WL 4773585, at *11 (D. Nev. Aug. 13, 2015) citing In re Grand Jury Subpoenas, 265 F. Supp. 2d at 326 as a case in which the privilege was extended from the lawyer to the public relations consultant because the lawyer hired the consultant to assist in dealing with the media and confidential communications were made for the purpose of assisting the lawyer in giving legal advice and at the direction of the lawyer.


11 Even in favorable cases in which the attorney-client privilege is extended to third parties, however, courts caution that the privilege will not apply if the client directly hires such a third party or the third party plays only a minimal role in assisting the lawyer in providing legal advice.